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No. 1075

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

WILLIAM C. HOLMAN, Warden
Kilby Prison, Montgomery, Alabama,

PETITIONER

vs.

JAMES R. DAVIS,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Opinions Below	2
Jurisdiction	3
Questions Presented	3, 4, 5
Constitutional Provisions Involved	5
Statement	5-8
Reasons for Granting Writ	8, 9, 10
Conclusion	11
Certificate	11, 12
Appendix A	13-17
Appendix B	18
Appendix C	19
Appendix D	20-25
Appendix E	26
Appendix F	27
Appendix G	28-30
Appendix G-1	31-36
Appendix H	37-38

CASES: Page

Davis v. Holman,
237 Fed. Supp. 490 ..... 2, 3, 7

Davis v. State,
42 Ala. App. 693,
165 So. 2d 917, cert. den.
276 Ala. 703, 165 So. 2d 917 ..... 2, 7

Johnson v. Zerbst,
304 U.S. 458, 58 S.Ct. 1019,
82 L.Ed. 1461 ..... 4, 9

Von Moltke v. Gillies,
332 U.S. 708, 68 S.Ct. 316,
92 L.Ed. 309 ..... 4, 9

Root v. Cunningham,
344 Fed. 2d 1 ..... 4, 9

Arellanes v. United States,
302 Fed. 2d 603 ..... 4, 9

Townsend v. Sain,
372 U.S. 293, 83 S.Ct. 745,
9 L.Ed. 2d 770 7

Carter v. Illinois,
329 U.S. 173, 67 S.Ct. 216,
91 L.Ed. 172 9

Moore v. Michigan,
355 U.S. 155, 78 S.Ct. 191,
2L.Ed. 2d 167 9

Hamilton v. Alabama,
368 U.S. 52, 82 S.Ct. 157,
7 L.Ed. 2d 114 10

Strickland v. State,
See Appendix G 1, infra pp 31-36 ..... 5, 10

STATUTES AND CONSTITUTION

	Page
Constitution of the United States:	
Fourteenth Amendment	5, 37
United States Code:	
Title 28, Section 1254(1)	3

No. _____

In the

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OCTOBER TERM, 1965

WILLIAM C. HOLMAN, Warden

Kilby Prison, Montgomery, Alabama,

PETITIONER

vs.

JAMES R. DAVIS,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

William C. Holman, as Warden of Kilby Prison, Montgomery, Alabama, by and through the Attorney General of the State of Alabama, Richmond M. Flowers, petitions for a writ of certiorari to review the order, judgment, and decision of the United States Court of Appeals for the Fifth Circuit, entered in the above captioned case on December 27, 1965, rehearing denied on January 19, 1966, and a stay of the mandate granted on January 31, 1966.

OPINIONS BELOW

The opnion of the United States District Court for the Middle District of Alabama, denying habeas corpus, is dated January 11, 1965, and is reported as *Davis v. Holman*, 237 Fed. Supp. 490, and is printed in Appendix A hereto, infra, pp. 13-17.

The United States District Court did deny a petition for rehearing in this cause by order dated January 19, 1965, and same is printed in Appendix B hereto, infra, pp. 18.

The United States Court of Appeals for the Fifth Circuit did on February 24, 1965, grant a certificate of probable cause and the same is printed in Appendix C hereto, infra, pp. 19.

The opinion of the United States Court of Appeals for the Fifth Circuit, reversing the District Court, and granting habeas corpus is unreported to date, but is printed in Appendix D hereto, infra, pp. 20-25.

The order and judgment of the United States Court of Appeals for the Fifth Circuit, denying rehearing, is dated January 19, 1966, and is printed as Appendix E hereto, infra. pp. 26.

The order and judgment of the United States Court of Appeals for the Fifth Circuit granting a stay of the mandate is dated January 31, 1966, and is printed as Appendix F hereto, infra, pp. 27.

The judgment and order of the Court of Appeals of Alabama, which affirmed the denial of the petition for writ of error coram nobis is reported as *Davis v. State*, 42 Ala. App. 693, 165 So. 2d 917, without opinion, and certiorari was denied by the Alabama Supreme Court, 276 Ala. 703, 165 So. 2d 917.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 27, 1965, and application for rehearing denied on January 19, 1966; however a petition for a stay of the mandate of the United States Court of Appeals for the Fifth Circuit was granted on January 31, 1966.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

I

Whether, under the due process clause of the Fourteenth Amendment of the United States Constitution, and under the facts and circumstances of the case at bar, which affirmatively reflect that the respondent was offered counsel by the trial court at his arraignment on April 3, 1961, in the Circuit Court of Tuscaloosa County, Alabama, and refused counsel at this time, and was again on the morning of the trial, April 17, 1961, offered counsel a second time and again refused this offer, must the trial court offer counsel to the respondent, *after the trial has started, and before accepting a guilty plea*, when the facts show that the trial court inquired of the respondent if he desired to enter such a plea in open court following the noon recess of this cause? See the order and judgment denying coram nobis, (R.pp. 31-35), and *Davis v. Holman*, 237 Fed. Supp. 490.

II

Did the United States Court of Appeals for the Fifth Circuit abuse its discretion in reversing the United States Dis-

trict Court for the Middle District of Alabama, which had determined that there was an intelligent waiver of counsel by the respondent, at both his arraignment and the outset of trial, under all the facts and circumstances in the case at bar? See the order and judgment of the Honorable W. C. Warren, Circuit Judge, denying coram nobis, (R.pp. 31-35), and Appendix A hereto attached and made a part hereof.

III

Did the United States Court of Appeals for the Fifth Circuit err in determining in its opinon in the case at bar, (See Appendix D hereto attached, infra, pp. 20-25) that *even though there was twice* an intelligent waiver of counsel in the case at bar, that the trial court must nevertheless offer counsel a third time before accepting a guilty plea *after trial had commenced*, and that the prior waivers of counsel could not relate to the time of taking the guilty plea?

IV

Has not the United States Court of Appeals for the Fifth Circuit, in the case at bar, carried the standard of intelligent waiver of counsel beyond that set by this Honorable Court in *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461; *Von Moltke v. Gillies*, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309, and related cases? See also *Root v. Cunningham*, 344 Fed. 2d 1, and *Arellanes v. United States*, 302 Fed. 2d 603.

V

Does not the opinion of the United States Court of Appeals for the Fifth Circuit in the case at bar, establish a standard for waiver of counsel which will be entirely too burdensome upon the trial judges, *particularly, where as here, counsel is understandingly and intelligently waived at the outset of trial?*

VI

Is not, the theory that the trial court must affirmatively offer counsel at each stage of the trial which may be deemed a "critical stage" several years after trial, carrying due process of law, under the Fourteenth Amendment of the United States Constitution, to an unreasonable standard?

VII

Because of the conflicting views concerning an offer of counsel where such has been intelligently waived, between the United States Court of Appeals for the Fifth Circuit's opinion in the case at bar, and those expressed by the Supreme Court of Alabama in *Strickland v. State*, which the United States Court of Appeals for the Fifth Circuit declined to follow in this case, should not this matter be finally determined by this Honorable Court? See Appendix D hereto, infra, pp. 20-25, and the opinion of the Supreme Court of Alabama as printed in Appendix G 1, infra, pp. 31-36.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment, United States Constitution.

STATEMENT

The respondent, James R. Davis, was arraigned on April 3, 1961, in the Circuit Court of Tuscaloosa County, Alabama, without counsel, but at this time the trial court explained to the respondent his right to counsel, and offered to appoint counsel in behalf of the respondent, also at this time. The respondent declined this offer and entered a plea of not guilty to the indictment which charged him with sodomy.

On April 17, 1961, the respondent's case was called for trial, and again for the second time, the trial judge explained

the respondent's right to counsel and again offered to appoint counsel in behalf of the respondent. (See transcript of State coram nobis proceeding, R.p. 47, being R.p. 65 in this Honorable Court.) This offer for the second time was refused, and the case proceeded to trial with the respondent being tried without counsel. The complete original trial transcript was placed in evidence at the coram nobis hearing and is included in the record in this Honorable Court, beginning on R.p. 66 and running to R.p. 100 of the record on application for writ of certiorari in this Honorable Court.

At the conclusion of the presentation of the State's case at the original trial, the respondent, following the noon recess and his consultation with the then, State Circuit Solicitor, Honorable Fred Nicol, now, State Circuit Judge, the respondent changed his plea to guilty provided that Mr. Nicol would recommend to the court a sentence of seven (7) years imprisonment of the case. This was done. (See R.p. 101-102 of the transcript in this Honorable Court.) The only two grounds which were not withdrawn at the coram nobis hearing on September 27, 1963, in the Circuit Court of Tuscaloosa County, were, (1) that he was tried without counsel and that there was no intelligent waiver of same, and (2) that he was coerced into pleading guilty. See the petition for writ of error coram nobis, R. pp. 19-22, and the statements of the trial court at the conclusion of the hearing, R.pp. 116-118. The trial court then took the coram nobis proceedings under advisement, and in an order and opinion dated November 27, 1963, entered its opinion denying the coram nobis petition with full findings of fact and conclusions of law squarely on the merits of the respondent's allegations, the trial court's order and judgment begins on R.p. 31 and runs to R.p. 35. The respondent next gave notice of appeal (R.pp. 36-42) and the trial court ordered the complete transcript of the coram nobis proceedings made up and sent the

Court of Appeals of Alabama for review. The respondent, James R. Davis, and the State of Alabama through the Attorney General of Alabama, each filed briefs, and the Court of Appeals of Alabama affirmed the Circuit Court of Tuscaloosa County, Alabama, without opinion, in an order reported as *Davis v. State,* 42 Ala. App. 693, 165 So. 2d 917. The respondent then filed an application for writ of certiorari in the Supreme Court of Alabama, and this too was denied without opinion, *Davis v. State,* 276 Ala. 703, 165 So. 2d 917.

The respondent next filed his petition for writ of habeas corpus in the United States District Court at Montgomery, Alabama, and that Honorable Court entered an order requiring the State of Alabama to show cause. The petitioner, and respondent below, William C. Holman, warden, by and through the Attorney General of the State of Alabama, Richmond M. Flowers, did file a return and answer to the show cause order as directed by the United States District Court. As a part of the return, the respondent below, the warden, did move to dismiss the proceeding, without an additional plenary hearing under *Townsend v. Sain,* 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed. 2d 770, as the respondent, warden, had included a complete transcript of the State proceedings in his return and motion. This transcript commences on R.p. 17 and runs to R.p. 123 of the record on application for writ of certiorari in this Honorable Court.

The United States District Court then granted the petitioner's motion to dismiss and in an opinion reported as *Davis v. Holman,* 237 Fed. Supp. 490, did deny the habeas corpus petition, determining, that there had been an intelligent waiver of counsel, both at arraignment, and on the day of the original trial, and denied the petition.

The respondent then asked for a certificate of probable cause and the United States Court of Appeals for the Fifth

Circuit on February 24, 1965, granted the respondent's request for a certificate of probable cause and appointed the Honorable Melton Hill Tankersley to represent the respondent in that Honorable Court. The respondent's able counsel filed his bref under date of May 20, 1965.

The United States Court of Appeals for the Fifth Circuit did enter its opinion and judgment reversing the cause on December 27, 1965. See Appendix D hereto, infra, pp. 20-25. The United States Court of Appeals for the Fifth Circuit did on January 19, 1966, deny rehearing, but did grant a stay of the mandate of that Honorable Court in order that this petition for writ of certiorari might be presented to this Honorable Court, by order dated January 31, 1966. See Appendix F, P. 27.

REASONS FOR GRANTING THE WRIT

1. When considering the entire record in the case at bar, the petitioner most respectfully submits, that the United States District Court for the Middle District of Alabama, was *eminenly correct* in determining that there was here an intelligent waiver of counsel by the respondent both at arraignment and also on the day of trial, and as pointed out by the Circuit Court of Tuscaloosa County, Alabama, this *waiver followed throughout the trial.* In light of these determinations, *by all prior courts,* the reversal of the case at bar by the United States Court of Appeals for the Fifth Circuit is submitted to be error.

2. It is further most respectfully submitted, that the opinion of the United States Court of Appeals for the Fifth Circuit, see Appendix D, carries the standard of intelligent waiver of counsel beyond that of basic fairness and reasonableness, as set forth in the opinions of this Honorable Court

in *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461; *Von Moltke v. Gillies*, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309; and related cases. It is further most respectfully submitted, that the opinion of the United States Court of Appeals for the Fifth Circuit, in the case at bar, would demand near perfection in the trial of criminal cases, with reference to the issue of appointment of counsel. This would clearly carry due process beyond a standard of a fair and impartial trial. See *Root v. Cunningham*, 344 Fed. 2d 1, and *Arellanes v. United States*, 302 Fed. 2d 603.

3. When reading the entire record in the case at bar, which shows that the respondent had in February 1961 been tried and convicted in three cases for burglary, in the Circuit Court of Tuscaloosa County, Alabama, and further, the efforts of the trial court to appoint counsel in behalf of the respondent, both at arraignment and again on the morning of trial, the opinion of the United States Court of Appeals for the Fifth Circuit is submitted to be error in requiring the trial court *to offer counsel a third time before accepting a guilty plea after trial had commenced.* It is clear that the respondent was fully aware of his constitutional right to counsel in the case at bar. As has been stated by this Honorable Court in *Carter v. Illinois*, 329 U.S. 173, 67 S.Ct. 216, 91 L.Ed. 172, and *Moore v. Michigan*, 355 U.S. 155, 78 S.Ct. 191, 2 L.Ed. 2d 167, the *trial judge may not force counsel upon the accused.* It is respectfully submitted, that the net effect of the opinion of the United States Court of Appeals for the Fifth Circuit would be to require the trial judge to force counsel upon the accused, and further, that the opinion of the United States Court of Appeals for the Fifth Circuit would place entirely too burdensome a procedure upon the trial judge particularly, where as here, counsel is understandingly and intelligently *waived at the outset of trial.*

4. A further basis for granting the writ, it is most re-

spectfully submitted, is to clarify the opinion of this Honorable Court in *Hamilton v. Alabama*, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed. 2d 114, which made the requirement of appointment of counsel, in capital cases, prior to arraignment in Alabama, a constitutional necessity. Because of the reasons explained by this Honorable Court in the Hamilton Case, it *does not follow* that the *accepting of a plea of guilty* is also a "critical stage" requiring an offer of appointment of counsel on the part of the trial court, particularly, where as here, counsel has been understandingly and intelligently twice waived. Certainly *basic fairness should require the accused to speak up* and advise the trial court as to his wishes concerning counsel. The theory that the trial court must affirmatively offer counsel at each stage may be deemed a "critical stage" several years after trial is carrying the requirement of due process of law under the Fourteenth Amendment of the United States Constitution to an unreasonable standard. Further, when reading the entire record one cannot help but be impressed by the efforts of Honorable W. C. Warren, Circuit Judge, to go out of his way to secure him every possible right.

5. Because of the conflicting views between the opinion of the United States Court of Appeals for the Fifth Circuit in the case at bar, and those expressed by the Supreme Court of Alabama in *Strickland v. State*, see Appendix G 1, infra, pp. 31-36, this matter should be finally determined by this Honorable Court.

6. It is most respectfully submitted that this Honorable Court's opinion in *Hamilton v. Alabama*, supra, and related cases does not demand perfection at every point in criminal trials of indigent parties. Basic fairness demands that the accused speak up, concerning counsel, particularly, where as here, counsel had been twice waived. Certainly a *trial judge*

ought to be able to rely upon an intelligent waiver of counsel made at the outset of trial. To hold otherwise is to allow the accused to trifle with the trial court's offer of appointment of counsel and would unduly interfere with the trial procedures.

In brief, the petitioner submits that the respondent was not denied due process of law because the trial court *did not again offer counsel before accepting a guilty plea after the trial had commenced.* Clearly a right as important as that of counsel, should not become a device with which the accused may play a game of baseball with the trial court.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

RICHMOND M. FLOWERS
Attorney General of the
State of Alabama

JOHN C. TYSON, III
Assistant Attorney General
of Alabama

CERTIFICATE

This is to certify that I, John C. Tyson, III, one of the attorneys for the petitioner, and a member of the Bar of the Supreme Court of the United States, prior to filing, served two copies of the foregoing Petition for Writ of Certiorari of the Petitioner, on James R. Davis, respondent, Route 3, Box 115, Kilby Prison, Montgomery, Alabama, and

served two copies on the Honorable Melton Hill Tankersley, Attorney at Law, 109 Washington Avenue, Montgomery, Alabama, by mailing them in a properly addressed envelope, with first class postage prepaid, in the United States mail, on the 25 day of February, 1966.

JOHN C. TYSON, III
Assistant Attorney General
of the State of Alabama

State Capitol
Montgomery, Alabama 36104

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

JAMES R. DAVIS,	)	
Petitioner,	)	
vs.	)	
WILLIAM C. HOLMAN, WARDEN,	)	CIVIL ACTION
KILBY PRISON, MONTGOMERY,	)	NO. 2144-N
ALABAMA, ET AL.,	)	
Respondents.	)	

ORDER DENYING APPLICATION FOR WRIT OF HABEAS CORPUS

The petitioner, James R. Davis, by order of this Court made and entered herein on November 30, 1964, filed in forma pauperis his application for a writ of habeas corpus. The petitioner alleges that he is presently incarcerated by the State of Alabama at Kilby Prison, Montgomery, Alabama, in violation of his constitutional rights. He alleges further that his constitutional rights were violated by the State of Alabama, acting through the Circuit Court of Tuscaloosa County, Alabama, in April, 1961, at which time he was found guilty of the offense of sodomy and was sentenced upon his plea of guilty to a term of seven years imprisonment in the State Penitentiary. In the petition now presented, Davis says that his constitutional rights were violated and his present incarceration is illegal in that he was denied the right to competent and effective counsel during the proceedings which resulted in the sentence he is now serving and that such denial violated his rights as guaranteed by the Constitution of the United States.

Upon this showing, this Court in its order of November 30, 1964, directed that the respondent Warden appear in this case on or before the 6th day of January, 1965, and show cause why this Court should not issue the writ of habeas corpus as herein prayed for by petitioner Davis. Pursuant to this order, the respondent Warden, by and through the Attorney General for the State of Alabama, filed with this Court a return and answer, and, in the alternative, motion to dismiss the application of Davis. With this return and answer, the respondent Warden presents to this Court a full and complete transcript including the evidence taken upon the hearing of the petition for writ of error coram nobis filed by Davis in his efforts to exhaust the remedies available to him through the judicial processes of the State of Alabama—as he is required to do under § 2254, Title 28, United States Code—and the order of the trial judge, which includes findings of fact and conclusions of law, denying the application for writ of error coram nobis, said order having been entered by the state court on November 27, 1963. Petitioner Davis presents to this Court a transcript of the original record, including the evidence taken upon the trial before he withdrew his plea of not guilty and entered his plea of guilty to the offense for which he was subsequently convicted and sentenced.

The issue now presented in this proceeding relates to a state prisoner's right to a plenary hearing in this Court on his habeas corpus petition notwithstanding a prior determination of the identical issues by the state court that conducted the original trial, imposed the sentence, and subsequently conducted the coram nobis proceeding. From an examination of the pleadings and documents, including the transcripts, presented to this Court, this Court now specifically finds and concludes that all of the matters which Davis now seeks to present to this Court in his habeas corpus pe-

tition were fully and fairly presented and considered in his state court coram nobis proceeding. The record, as now presented, reflects that Davis was fully and fairly represented by court-appointed counsel upon his coram nobis proceeding and that he intelligently waived and even refused the appointment of counsel upon the original proceeding that resulted in his conviction and present incarceration. As to the waiver and refusal of counsel by Davis upon his original trial, the state judge found as follows:

> "This Court finds that the petitioner (Defendant) is an intelligent young man who by his speech and manner manifested every evidence of understanding both at the time of arraignment and at the time of trial the questions put to him of whether he wished an attorney appointed to assist him and having understood, refused such offer, not only understandingly but in an arrogant manner. And, it is the opinion of this Court that this arrogance was falsely based on a belief that his fellow prisoners who were commonly locked up with him in the Tuscaloosa County Jail, the scene of the crime, would be afraid to testify against him, several of them already having been convicted of sundry crimes and awaiting transportation to the State Penitentiary of Alabama. Thus, this Court finds that the petitioner (Defendant) in the original trial was offered counsel both at his arraignment and again fourteen (14) days later, that he is an intelligent young man, that he had an intelligent understanding of the offer of an attorney and refused such an appointment, for whatever reason he may have had, and that by so doing he waived any Constitutional Rights which may be afforded him, and that beyond insisting that he accept an appointed attorney to represent him, the Court could go no further and owed no obligation to go further or do more."

This Court specifically finds and concludes that the coram nobis hearing by the Circuit Court of Tuscaloosa County, Alabama, was without vital flaw. It affirmatively appears to this Court upon this submission that a full, fair, and impartial judicial inquiry was conducted by the Circuit Judge of Tuscaloosa County, Alabama, concerning the allegation Davis now makes to this Court in support of his petition for writ of habeas corpus. It further affirmatively appears that the order and judgment, which includes detailed findings of fact and conclusions of law, as made and entered on November 27, 1963, by the Honorable W. C. Warren, Circuit Judge, Sixth Judicial Circuit of Alabama, after the submission in the coram nobis proceeding, reflects that the State of Alabama has given full and fair consideration to the issue Davis now seeks to raise by his petition for writ of habeas corpus in this Court. The entire record in this case, as it concerns the handling of the matter by the state court, reflects an awareness on the part of the state judicial officers of the constitutional requirement that imposes upon them the same responsibilities to protect persons from violations of their constitutional rights as are imposed upon federal courts. The record in this case reflects that Circuit Judge W. C. Warren had an acute awareness and an intelligent understanding of *Gideo v. Wainwright*, decided March 18, 1963, 372 U.S. 335.

Under the facts as presented in this case, this Court elects not to entertain and conduct a hearing on petitioner Davis's application for habeas corpus for the reason that each of the allegations that Davis sets out in support of his contention that he was not afforded counsel by the state court upon the proceeding that resulted in his conviction and present incarceration has been determined adequately and fairly by the courts of the State of Alabama. *Townsend v. Sain*, 372 U.S. 293; *Rogers v. Richmond*, 252 F. 2d 807, cert. denied, 357 U.S. 220; *Thomas v. Ariozna*, 356 U.S. 390; *Brown v. Allen*,

344 U.S. 443; *Allison v. Holman* (5th Cir. 1963), 326 F. 2d 294, cert. denied, 376 U.S. 957; *Allen v. Holman*, 222 F. Supp. 10, probable cause denied, United States Court of Appeals for the Fifth Circuit, November 6, 1963; *Mills v. Holman*, 225 F. Supp. 886, probable cause denied, United States Court of Appeals for the Fifth Circuit, March 25, 1964, cert. denied, —U.S.—(October, 1964).

In accordance with the foregoing and for good cause, it is the ORDER, JUDGMENT and DECREE of this Court that the petition of James R. Davis for writ of habeas corpus, filed herein in forma pauperis by leave of this Court in its order of November 30, 1964, be and the same is hereby denied.

It is further ORDERED that this cause be and the same is hereby dismissed.

The Clerk of this Court is ORDERED and DIRECTED to forward copies of this order to James R. Davis in care of the Warden, Kilby Prison, Montgomery, Alabama, and to the Honorable Richmond M. Flowers, Attorney General, State of Alabama, Montgomery, Alabama.

Done, this the 11th day of January, 1965.

FRANK M. JOHNSON, JR.
UNITED STATES
DISTRICT JUDGE

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

JAMES R. DAVIS,	)	
Petitioner,	)	
vs.	)	CIVIL ACTION
WILLIAM C. HOLMAN, WARDEN,	)	NO. 2144-N
KILBY PRISON, MONTGOMERY,	)	
ALABAMA, ET AL.,	)	
Respondents.	)	

ORDER

This cause is now submitted upon the motion for a rehearing presented to this Court on this date by the petitioner, James R. Davis.

Upon consideration of said motion for a rehearing and for good cause, it is the ORDER, JUDGMENT and DECREE of this Court that petitioner Davis's motion for a rehearing, presented to this Court on January 19, 1965, be and the same is hereby overruled and denied.

The Clerk of this Court is DIRECTED to forward copies of this order to the petitioner, James R. Davis, in care of the Warden, Kilby Prison, Montgomery, Alabama, and to the Honorable Richmond M. Flowers, Attorney General, State of Alabama, Montgomery, Alabama.

Done, this 19th day of January, 1965.

FRANK M. JOHNSON, JR
UNITED STATES
DISTRICT JUDGE

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

MISC. NO. 127

JAMES R. DAVIS,

Appellant,

versus

WILLIAM C. HOLMAN, Warden, Kilby Prison, Montgomery, Alabama, ET AL,

Appellees.

ON APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE.

Before RIVES, BROWN and BELL, Circuit Judges.

BY THE COURT:—

The Petitioner's Motion for issuance of a Certificate of Probable Cause for allowance of his appeal in forma pauperis is hereby granted.

The Petitioner's further Motion for appointment of counsel is hereby granted.

(Original filed February 24, 1965)

APPENDIX "D"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 22447

JAMES R. DAVIS,

Appellant,

versus

WILLIAM C. HOLMAN, Warden of Kilby Prison, Montgomery, Alabama,

Appellee.

Appeal from the United States District Court for the Middle District of Alabama

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(December 27, 1965.)

Before MARIS,* RIVES, and BELL, Circuit Judges.

BELL, Circuit Judge: Appellant's petition for habeas corpus was denied in the District Court without a hearing. The court was of the view that the state court, in a prior coram nobis proceeding, had fully and fairly received and considered all of the relevant facts underlying the allegation that appellant had been denied his federal constitutional

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* Of the Third Circuit, sitting by designation.

right to counsel.[1] *Davis v. Holman, Warden*, M.D. Ala., 1965, 237 F.SUPP. 490.

Appellant was arraigned on April 3, 1961 in the Circuit Court of Tuscaloosa County, Alabama without counsel and pleaded not guilty to an indictment charging him with sodomy. He went to trial on April 17, 1961 without counsel. The trial progressed to the point where the state had rested its case. Appellant then changed his plea from not guilty to guilty and was sentenced to seven years. The record indicates that the plea followed a conversation between appellant and the prosecutor during a recess whereunder the prosecutor agreed to and did recommend the seven year sentence. The crime of sodomy carries punishment of from two to ten years. Ala. Code, Title 14, § 106. Appellant was serving a sentence of three years on another conviction at the time and there was no appeal. It also appears that the act of sodomy took place in the Tuscaloosa jail, that it resulted from force and that an accomplice who joined appellant in the forcing process received the same sentence.

Thereafter the petition for a writ of error coram nobis was filed in the state trial court. Appellant was represented by appointed counsel, with the judge who presided over the original trial again presiding. The petition was denied and dismissed. The court found as a fact that appellant was offered counsel both on the arraignment and on the trial and that he waived counsel. This judgment was affirmed by the Court of Appeals of the State of Alabama, and certiorari was denied by the Supreme Court of Alabama. *Davis v. State*,

[1] See **Pate v. Holman**, 5 Cir., 1965, 341 F.2d 764; and **Allison v. Holman**, 5 Cir., 1963, 326 F.2d 294, **cert. den.**, 376 U.S. 957, 84 S.Ct. 979, 11 L.Ed.2d 975, on the Alabama coram nobis procedure as meeting the evidentiary hearing standard of **Townsend v. Sain**, 1963, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770. The record in the District Court and before us includes the transcript of the coram nobis hearing, complete with findings of fact and conclusions of law as well as the original state trial record.

1964, 165 So.2d 917. The coram nobis record amply supports this finding of the state court that appellant was offered and waived counsel, and we find no error in the action taken by the District Court on these contentions.

This, however, is not the end of the matter. An additional issue presented is whether appellant was entitled to counsel at the stage of the proceeding where he changed his plea of not guilty to guilty, and with respect to this issue we reverse.

We begin by eliminating certain threshold questions. All state remedies have been exhausted and there is no contention that appellant was not an indigent. Moreover, it is settled that the right to counsel principle of *Gideon v. Wainwright*, 1963, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 is retrospective and would embrace the appellant here. *Pate v. Holman*, 5 Cir., 1965, 341 F.2d 764; *Williams v. State of Alabama*, 5 Cir., 1965, 341 F2d 777; *Barnes v. State*, Ala. App., 1964, 169 So.2d 313, *cert. den.*, 169 So.2d 313; and *Brown v. State*, Ala., 1965, 170 So.2d 504. And the *Gideon* principle also requires that counsel be accorded on pleas of guilty as well as for trial. *Doughty v. Maxwell*, 1964, 376 U.S. 202, 84 S.Ct. 702, 11 L.Ed.2d 650; *Harvey v. State of Mississippi*, 5 Cir., 1965, 340 F.2d 263; *Palumbo v. State of New Jersey*, 3 Cir., 1964, 334 F.2d 524; *United States ex rel. Durocher v. La Valle*, 2 Cir., 1964, 330 F.2d 303, *cert. den.*, 377 U.S. 998, 84 S.Ct. 1921, 12 L.Ed.2d 1048. Indeed this was settled law before *Gideon*. *Carnley v. Cochran*, 1962, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70; and *Rice v. Olson*, 1945, 324 U.S. 786, 65 S.Ct. 989, 89 L.Ed. 1367.

We note also that the distinguished state trial udge was in some doubt as to whether he should not have again offered counsel to appellant when he withdrew his plea of not guilty and entered the guilty plea. His doubt was later confirmed

by the Court of Appeals of Alabama which held that an indigent defendant must be offered counsel at the stage of a proceeding where he changes his plea from not guilty to guilty. *Strickland v. State,* May 4, 1965, So.2d . There the defendant waived counsel on arraignment and then changed his not guilty plea when the case was called for trial. The Supreme Court of Alabama reversed the Court of Appeals on the ground that the waiver of counsel at the arraignment served to shift the burden to the defendant to request counsel if he desired counsel at a later proceeding in the same case. *Strickland v. State,* Sept. 30, 1964, So.2d . This reasoning of the Alabama Supreme Court is urged by the state as controlling here. We reject it however because it would appear to impose a burden on appellant over and above what is envisaged by the right to counsel provision of the Sixth Amendment. Appellant was entitled to counsel, unless waived, at each critical stage of the proceedings against him. These included his arraignment in view of the office it serves under Alabama law, *Hamilton v. State of Alabama,* 1961, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114; *Williams v. State of Alabama, supra;* his trial, and upon the entry of the guilty plea.

The contention in the *Williams* case, *supra,* was that a waiver of trial counsel constituted a waiver, through retrospective operation, of counsel at arraignment. The reasoning of the court there, resting on the doctrine that courts should indulge every reasonable presumption against waiver of fundamental constitutional rights, *Johnson v. Zerbst,* 1938, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461; *Carnley v. Cochran, supra,* is apt here:

"The State assumes, without articulating the argument, that Williams lost his right to counsel at arraignment when he waived his right to counsel at his trial. This argu-

ment overlooks the meaning of 'waiver'. A waiver, in any kind of a case, is an intentional relinquishment of an *existing* right. 'The right *** allegedly waived *must be in existence* and be known to exist by the party possessing it ***.' Chambers & Co. v. Equitable Life Assurance Soc., 5 Cir., 1955, 224 F.2d 338, 345. (Emphasis supplied.) 'Waiver' is sometimes defined as 'an agreement to forego some advantage which the party waiving might at his option have demanded.' Helvering v. Ethel D. Co., 1934, 63 App. D.C. 157, 70 F.2d 761, 763. A present or future right can be waived, but not a right already lost. Here, for example, at his *trial* Williams could not waive his right to counsel at *arrignment;* then it did not exist. Williams's waiver of counsel at his trial could not operate prospectively to deprive him of a right to counsel on appeal or at a second arraignment (Chessman v. Teets, 1957, 354 U.S. 156, 77 S.Ct. 1127, 1L.Ed.2d 1253); nor could his waiver operate retrospectively to deprive him of a right he was no longer in a position to exercise.

". . . The right to counsel upon trial is distinct from the right to counsel upon arraignment, and neither should be confused with the right to effective representation at any other 'critical stage', . . ."

In *Rice v. Olson, supra,* the court stated that a defendant who pleads guilty is entitled to the benefit of counsel, and a request for counsel is not necessary. The question there was whether the petitioner waived his right to counsel and the court reversed for hearing and determination in light of the disputed facts. The plea of guilty did not *per se* constitute waiver.

In *Carnley v. Cochran, supra,* the court reiterated that ". . . where the assistance of counsel is a constitutional re-

quisite, the right to be furnished counsel does not depend on a request," and went on to say:

> ". . . when the Constitution grants protection against criminal proceedings without the assistance of counsel, counsel must be furnished 'whether or not the accused requested the appointment of counsel. . . .'"

We hold that the change by appellant of his plea from not guilty to guilty was a critical stage in the criminal proceedings against him for which he was entitled to counsel, and that there was no waiver of counsel. It is undisputed; in fact, it affirmatively appears from the record that appellant was not offered counsel to represent him in connection with the plea.

Thus, as was true in *Williams v. State of Alabama, supra*, all of the pertinent facts necessary for decision on the issue of appellant's right to counsel on the plea were brought out at the coram nobis hearing and it was unnecessary for the District Court to conduct an evidentiary hearing. Appellant was deprived of his constitutional right to counsel. This means that the case must be reversed and remanded with directions that the District Court grant the writ of habeas corpus by appropriate order consistent with the right of the State of Alabama to rearraign and retry appellant, and also consistent with the right of the State to hold the defendant in custody or under bail pending rearraignment and retrial.

REVERSED and REMANDED with directions.

APPENDIX "E"

[165]—Bell

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 22,447

JAMES R. DAVIS,

Appellant

v.

WILLIAM C. HOLMAN, WARDEN,
KILBY PRISON, MONTGOMERY, ALABAMA,

Appellee

Appeal from the United States District Court for the Middle District of Alabama

ON PETITION FOR REHEARING (January 19, 1966)

Before MARIS*, RIVES and BELL, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is hereby

DENIED.

* Of the Third Circuit, sitting by designation.

APPENDIX "F"

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

JAMES R. DAVIS

Appellant,

versus

WILLIAM C. HOLMAN,
Warden of Kilby Prison, Montgomery, Alabama

Appellee.

NO. 22447

ON CONSIDERATION OF THE APPLICATION of the Appellee in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable Appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of Sixty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within Sixty days from the date of this order there shall be filed with the clerk of this Court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of Sixty days from the date of this order, unless the above mentioned certificate shall be filed with the clerk of this Court within that time.

DONE AT NEW ORLEANS, LA., THIS 31st day of January, 1966.

/s/Griffin B. Bell
UNITED STATES
CIRCUIT JUDGE

APPENDIX "G"

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

OCTOBER TERM, 1964-65

6 Div. 54

William R. Strickland

v.

State

Appeal from Tuscaloosa Circuit Court

CATES, JUDGE

Strickland appeals the denial of coram nobis by the Circuit Court of Tuscaloosa County.

His principal complaint is that he was denied effective assistance of counsel while indigent.

In 1961, while in the Tuscaloosa County jail waiting to be transported to the penitentiary, Strickland escaped. He was indicted by the Tuscaloosa County grand jury for the offense denounced by Code 1940, T. 14, § 153, as amended, which reads:

"Any convict who escapes or attempts to escape from the penitentiary, or from any person or guard having him in charge under authority of law, either within or outside the walls of the penitentiary, before the expiration of the term for which he was sentenced, shall, on conviction be imprisoned for an additional term of not less than one year."

According to the record before us, based on the bench notes of the late Honorable Reuben Wright, then Presiding Judge of the Tuscaloosa Circuit, Strickland, on arraignment, was asked if he wanted counsel and the bench notes affirmatively show that he said, in effect, that he would arrange for his own lawyer by the time for trial.

However, when the trial did come up, Strickland appeared without a lawyer and changed his plea from not guilty to guilty and received a four-year sentence on conviction by the court without the intervention of a jury.

We consider that reversible error was committed in accepting this change of plea without first showing that there was again an intelligent waiver of counsel. The offense denounced is of very doubtful[1] application to a prisoner who has not been taken into the penitentiary system within the meaning of our law which allows him no credit for obedience to the sentence until he is in the warden's custody. Being merely in the jail waiting for the penitentiary transportation agent gives no such credit.

In *Rice v. Olsen*, 324 U.S. 786, at 788, we find:

"A defendant who pleads guilty is entitled to the benefit of counsel, and a request for counsel is not necessary."

Both this court and the Supreme Court of Alabama have had occasion to consider the retrospectivity of *Gideon v. Wainwright*, 372 U. S. 335. *Barnes*, — Ala. App. —. 169 So. 2d 313; *Brown*, — Ala. —. 170 So. 2d 504.

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[1] Contrast **Bradford**, 146 Ala. 150, 41 So. 471 (Anderson, J., for a unanimous court), with **Bradford**, 149 Ala. 1, 42 So. 990 (Tyson, C. J., for the court, Anderson and McClellan, J.J., dissenting). These two cases have never been reconciled.

In *Commonwealth v. Rundle*, 415 Pa. 515, 204 Atl. 2d 439, the Supreme Court of that state, we think correctly, applied the *Gideon* principle to a plea of guilty. In view of the necessity of an affirmative disclosure in the conviction record under the original indictment as exemplified in *Carnley v. Cochran*, 369 U. S. 506, the burden of showing waiver in the absence of counsel for an indigent felony defendant is cast upon the State rather than the petitioner even in a post conviction proceeding.

Here, while it can be fairly said that Strickland waives the appointment of counsel on his original arraignment, nevertheless the next critical step leading to his conviction was when he changed his plea to guilty.

The record before us is completely blank as to whether or not Judge Warren, who was presiding at the time of Strickland's second appearance, made further enquiry as to his indigency and non-accompaniment by counsel. See *Palumbo v. State of New Jersey*, 334 F. 2d 524, and the dissenting opinion of Bell, J., in *Post v. Boles*, 332 F. 2d 738.

REVERSED AND REMANDED.

JOHNSON, J., dissents.

APPENDIX "G1"

THE STATE OF ALABAMA - - JUDICIAL DEPARTNENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM — 1965

6 Div. 226

Ex parte State of Alabama
ex rel Attorney General

[In re: William R. Strickland

v.

State of Alabama]

Petition for Writ of Certiorari to the Court of Appeals.

MERRILL, JUSTICE.

The State petitioned for a writ of certiorari to the Court of Appeals, and we granted the writ. The defendant Strickland had appealed from a judgment of the Circuit Court of Tuscaloosa County denying his petition for writ of error coram nobis, and the Court of Appeals reversed the judgment on the ground that the circuit court accepted a plea of guilty without first ascertaining that the defendant had made an intelligent waiver of counsel.

The defendant was indicted for escaping from custody (Tit. 14, § 153, as amended, Code 1940), was arraigned on May 26, 1961, and on arraignment, was asked if he wanted counsel and "he said, in effect, that he would arrange for his own lawyer by the time for trial." We note that this took place in 1961, nearly two years before the decision of the

Supreme Court of the United States in *Gideon v. Wainwright*, 372 U. S. 335, 83 Sup. Ct. 792, 9 L. Ed. 2d 799, which was decided on March 18, 1963, and one year before the Federal Supreme Court said, in *Carnley v. Cochran*, 369 U. S. 506, 82 Sup. Ct. 884, 8 L. Ed. 2d 70 (1962), that: "The record must show, or there must be allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not a waiver." (We do not raise the point of retrospectivity of the Federal cases, but merely to show that the trial court was offering counsel to the accused even before those decisions).

We take the following language from the opinion of the Court of Appeals to mean that that was such an intelligent and understanding waiver: "Here, while it can be fairly said that Strickland waived the appointment of counsel on his original arraignment, nevertheless the next critical step leading to his conviction was when he changed his plea to guilty."

The sequence of events follows: Strickland had been convicted of assault with intent to murder, sentenced to two years in the penitentiary on December 31, 1960, placed on probation, which was revoked in April, 1961, and he was being held in the Tuscaloosa County jail, from which he escaped on May 16, 1961. He was apprehended, indicted for the offense of escaping and, on arraignment, intelligently and understandingly waived appointment of counsel to represent him, which was noted on the trial docket. On arraignment, he pleaded not guilty. Three weeks later, on June 13, 1961, he changed his plea from not guilty to guilty and was sentenced to four years. On July 22, 1963, he filed a petition for writ of error coram nobis, counsel was appointed for him; the cause was heard in March, 1964, and after making findings and conclusions of law, the trial court denied the

petition; and petitioner appealed and was represented by appointed counsel on his appeal to the Court of Appeals and on the writ of certiorari in this court.

The question for decision here is whether the burden remains on the State to show affirmatively that the accused had counsel at every stage of the proceedings in his criminal case, when the accused made a competent, intelligent and voluntary waiver of counsel at the first stage of the proceedings — his arraignment — and the waiver was recorded on the trial docket.

We think the facts in this case justify a holding that the burden shifted to the defendant to request counsel if he desired one at a later proceeding in the same case.

The law, though not settled when the defendant was convicted of being an escapee, is now settled that he had a right to counsel beginning with his arraignment, and at every stage of the proceedings, including his plea of guilty unless he has made a competent, intelligent and voluntary waiver. But once he has made such a waiver, the burden ought to be on the defendant to show that he has changed his mind and desires the services of counsel.

A recent case of this court illustrates the wisdom of such a holding. The accused, represented by counsel, was convicted of robbery and, within six months, gave notice of appeal in writing and requested counsel and a transcript on appeal. The trial court denied the request and the defendant, in the penitentiary, petitioned this court for relief. When we had verified his account of the trial court's action, we reversed the judgment and remanded the cause to the trial court for proper action. *Keeton v. State*, 175 So. 2d 774. The defendant was not represented by counsel. This was a step or a stage

in the proceedings against him, but we did not consult with or ascertain from him as to whether he wanted counsel. We found merit in his petition and ordered remedial steps to insure that his case could be properly reviewed on appeal. Could it be reasonably asserted at some later time that he was deprived of his constitutional rights because he had no counsel in the proceeding before this court? We do not think so.

And just as we consider that Keeton was not deprived of a constitutional right when he had no counsel in his proceeding here, just so do we think that Strickland was not deprived of any constitutional right when he pleaded guilty to the escape charge without counsel after he had effectively waived right to counsel on arraignment and had not subsequently made a request that counsel be furnished him.

We think the case of *Palumbo v. State of New Jersey*, 334 F. 2d 524, is distinguishable from the instant case. There, one Mr. Armstrong had represented Palumbo in one case and the county prosecutor had asked him to represent Palumbo in two other cases. But the court did not assign these cases to Mr. Armstrong and Mr. Armstrong was present on the day of the trial and notified the court that he was not representing Palumbo. The court later received Palumbo's plea of guilty without appointing counsel. There, Palumbo had never had counsel in the two cases. Here, there had been an effective waiver by Strickland on the first occasion that he would have needed counsel to represent him.

One other matter deserves mention. The defendant was indicted under Tit. 14, § 153, as amended, Code 1940, which reads:

"Any convict who escapes, or attempts to escape from the penitentiary, or from any person or guard having him

in charge under authority of law, either within or outside the walls of the penitentiary, before the expiration of the term for which he was sentenced, shall, on conviction be imprisoned for an additional term of not less than one year."

The opinion of the Court of Appeals contains the following: "* * * The offense denounced is of very doubtful[1] application to a prisoner who has not been taken into the penitentiary system within the meaning of our law which allows him no credit for obedience to the sentence until he is in the warden's custody. * * *" (1. Contrast *Bradford*, 146 Ala. 150, 41 So. 471 (Anderson, J., for a unanimous court), with *Bradford*, 149 Ala. 1, 42 So. 990 (Tyson, C. J., for the court, Anderson and McClellan, J. J., dissenting).

These two cases have never been reconciled.)

The offense denounced by Tit. 14, § 153, as amended, is essentially the same as in Sec. 4704, Code 1896, except that reference to hiring convicts is eliminated. It is true that the case of *Bradford v. State*, 146 Ala. 150, 41 So. 471, casts some doubt as to a conviction under Section 4707, but this court removed any doubt in the same case, *Bradford v. State*, 149 Ala. 1, 42 So. 990, and, after discussing the doubtful point said: "It follows, therefore, the former opinion in this case is wrong, and must be overruled." There has never been any need to reconcile the two cases; the latter simply overrules the former as to whether the indictment charged an offense under Sec. 4707, Code of 1896.

The judgment of the Court of Appeals is reversed and the cause is remanded.

REVERSED AND REMANDED.

Livingston, C. J., Lawson, Goodwyn, Coleman and Harwood, JJ., concur.

I, Richard W. Neal, Deputy Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 30 day of Sept., 1965.

Richard W. Neal
Deputy Clerk, Supreme Court of Alabama

APPENDIX "H"

(AMENDMENT XIV)

Section 1.

(Citizenship Rights Not to Be Abridged by States)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any states deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

(Apportionment of Representatives in Congress)

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

(Persons Disqualified from Holding Office)

No person shall be a senator or representative in congress, or elector of president and vice president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may, by a vote of two-thirds of each house, remove such disability.

Section 4.

(What Public Debts Are Valid)

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

(Power to Enforce This Article)

The congress shall have power to enforce, by appropriate legislation, the provisions of this article.